

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 11
)	
GEORGE PETER PROTOS)	CASE NO. 02-74770-MHM
)	
Debtor)	
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GEORGE PETER PROTOS)	
)	
Plaintiff)	ADVERSARY PROCEEDING
)	NO. 04-6090
v.)	
)	
GARY A. SILVER)	
)	
Defendant)	

ORDER GRANTING DEFENDANT’S MOTION TO DISMISS THE COMPLAINT

This adversary proceeding is before the court on Defendant’s motion to dismiss the complaint or in the alternative for a more definite statement. Plaintiff initiated this adversary proceeding as a core proceeding pursuant to 28 U.S.C. § 157(b) to obtain an injunction in aid of the automatic stay. Plaintiff asserts that Defendant violated the automatic stay which arose pursuant to 11 U.S.C. § 362 when Plaintiff filed his bankruptcy petition.

In his F.R.C.P. 12(b)(1) motion to dismiss the complaint, Defendant argues that the claims alleged by Plaintiff are not within the bankruptcy court’s subject matter jurisdiction because they are neither core proceedings nor claims related to a bankruptcy proceeding within the meaning of 28 U.S.C. § 157. Additionally, Defendant seeks dismissal of Plaintiff’s complaint for failure to state a claim pursuant to F.R.C.P. 12(b)(6) because Plaintiff’s factual allegations fail to suggest a recognized legal theory upon which relief can be granted. In response, Plaintiff

argues that this adversary proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b) and that Defendant's motion to dismiss for failure to state a claim should be denied. For the reasons set forth below, Defendant's motion is granted.

Statement of Facts

Defendant is a creditor who filed a proof of claim for \$356,503.35 in Plaintiff's bankruptcy case. Additionally, Defendant filed a complaint objecting to discharge pursuant to 11 U.S.C. § 727.¹ Defendant argues that Plaintiff initiated this adversary proceeding in an attempt to retaliate against Defendant for objecting to discharge.

In the complaint in this Adversary Proceeding, Plaintiff alleges that Defendant violated the automatic stay by engaging in an ongoing series of harassing acts in an attempt to interfere with Plaintiff's personal and business relationships and to induce Plaintiff to pay Defendant's claim outside the normal bankruptcy distribution. Specifically, Plaintiff alleges that Defendant yelled obscenities at him on three separate occasions between June 2003 and February 2004, twice while Plaintiff was in the company of current or prospective business associates. Plaintiff also alleges that Defendant engaged in covert surveillance of him on numerous occasions between August and September 2003. These alleged incidents occurred after Plaintiff's bankruptcy filing and after Defendant had notice of the bankruptcy proceedings and the automatic stay. Plaintiff alleges that Defendant's conduct is intended to compel payment of a prepetition claim outside the normal bankruptcy distribution by harassing and terrorizing him, harming his business relations, and impairing his ability to earn a living. Plaintiff seeks an injunction to prohibit Defendant from further violating the automatic stay. Plaintiff also requests

¹ Adversary Proceeding No. 03-06473.

actual and punitive damages against Defendant for slander and intentional infliction of emotional distress.

Defendant denies each of Plaintiff's factual allegations regarding harassment, use of obscenities, and surveillance. Defendant requests, under F.R.C.P. 12(b)(1), that Plaintiff's complaint be dismissed for lack of subject matter jurisdiction because Plaintiff's case is neither a core proceeding nor a non-core proceeding related to a bankruptcy proceeding within the meaning of 28 U.S.C. § 157. Defendant also requests, under F.R.C.P. 12(b)(6), that Plaintiff's complaint be dismissed for failure to state a claim because Plaintiff's factual allegations fail to suggest a recognized legal theory upon which relief can be granted.

Discussion and Conclusions of Law

Motion to Dismiss Standards

In deciding whether to grant a motion to dismiss a complaint pursuant to F.R.C.P. 12(b)(6), incorporated in Bankruptcy Rule 7012(b), the facts pleaded by Plaintiff are accepted as true and construed in the light most favorable to the Plaintiff. *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989 (11th Cir. 1983). A motion to dismiss for failure to state a claim should be granted only if "it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 US 41, 45-46 (1957). The Court may not, however, assume that Plaintiff can prove facts not alleged in the complaint. *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 US 519 (1983).

Violation of the Automatic Stay

Plaintiff argues that Defendant has willfully violated 11 U.S.C. § 362(a) by engaging in an ongoing series of harassing acts in an attempt induce Plaintiff to pay Defendant's claim outside of the normal bankruptcy distribution. Section 362(a)(6) specifically prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." The question presented, therefore, is whether the acts alleged by Plaintiff are acts to "collect, assess, or recover a claim against the debtor" within the meaning of the Bankruptcy Code.

The protections of the automatic stay are limited to collection activities asserted against the debtor. *Singley v. Am. Gen. Fin.*, 233 BR 170 (Bankr. S.D. Ga. 1999). A violation of the automatic stay under 11 U.S.C. 362(a)(6) requires that a creditor act with the intent to collect a prepetition debt. *See id.* Harassment alone does not violate the automatic stay simply because the harassor is a creditor and the harassee is a debtor. A creditor who harasses a debtor violates 11 U.S.C. § 362(a)(6) if the purpose of harassment is aimed at collecting a prepetition debt. *In re Osman*, 302 BR 357, 365 (Bankr. N.D. Ohio 2003).

Plaintiff relies on *In re Kortz*, 283 BR 706 (Bankr. N.D. Ohio 2002), for the proposition that willful and persistent harassment of a debtor by a creditor is a violation of the automatic stay entitling debtor to actual and punitive damages. In *Kortz*, the creditor placed serial telephone calls to debtor asking for debtor's bank account number in order to withdraw funds and threatened to garnish debtor's wages. Plaintiff's reliance on *Kortz*, however, is misplaced. The harassment in *Kortz* included threats of garnishment and requests for access to debtor's bank account – harassment that was clearly aimed at collecting a prepetition debt. Plaintiff here

alleges that Defendant shouted profanities at him three times and engaged in covert surveillance of him twice. If the alleged behaviors were proven to have occurred, intent to collect a debt must be inferred, as such behaviors are not activities which would logically lead to debt collection. The inference is too weak.

A debtor is not always required to produce direct evidence of a creditor's intent to seize the debtor's funds in order to prove a violation of 11 U.S.C. § 362(a)(6), however. For example, in *Cal. State Univ., Fresno v. Gustafson*, 111 BR 282 (9th Cir. BAP 1990), *rev'd on other grounds*, 934 F. 2d 216 (9th Cir. 1991), the court held that a university violated the automatic stay by withholding a debtor's diploma. Central to that decision, however, was the conclusion that the "[w]ithholding of the transcript could serve no purpose other than to compel the repayment of the debt or reaffirmation of the obligation." *Id.* at 286-287. In the case at hand, Plaintiff has not alleged any action directly aimed at collecting a debt. Defendant's actions are not inexplicable absent a motivation to collect: Defendant may be angry, if not very angry. While Defendant's alleged actions are reprehensible, they sound more in tort than in violation of the Bankruptcy Code. Plaintiff may have a remedy in the state courts.

Slander and Intentional Infliction of Emotional Distress

Absent a violation of 11 U.S.C. § 362, jurisdiction is no longer proper in bankruptcy court for Plaintiff's claims for slander and intentional infliction of emotional distress. A bankruptcy court has jurisdiction over matters arising under the Bankruptcy Code. *Cont'l Nat'l Bank of Miami v. Sanchez*, 170 F.3d 1340 (11th Cir. 1999). Title 28 sets forth in section 157(b)(2)(A) a list of core proceedings under Title 11 of the United States Code. The Eleventh

Circuit has made the following distinction between core and "otherwise related," or "non core," proceedings:

If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding...If the proceeding is one that would arise only in bankruptcy, it is also a core proceeding...If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be related to the bankruptcy because of its potential effect, but under 157(c)(1) it is an "otherwise related" or non core proceeding.

Id at 1348 (citing *Wood v. Wood*, 825 F.2d 90 (5th Cir. 1987)). A claim for violation of the automatic stay under 11 U.S.C. § 362 would arise under the Bankruptcy Code and would be a core proceeding under 28 U.S.C. 157(b)(2)(G). Once Plaintiff's claim for violation of the automatic stay is dismissed, however, Plaintiff's claims for slander and intentional infliction of emotional distress cannot be characterized as core proceedings. Plaintiff's slander and intentional infliction of emotional distress claims are state law tort claims, do not invoke substantive rights created by bankruptcy law, and could occur without the existence of a bankruptcy case. Plaintiff failed to state a claim for violation of the automatic stay under 11 U.S.C. § 362. An unsound claim cannot be the basis for finding this adversary proceeding to be a core proceeding. See *Cont'l Nat'l Bank of Miami*, 170 F. 3d 1340. Therefore, as Plaintiff presents no claims arising from substantive rights created by bankruptcy law, this adversary proceeding is a non-core proceeding.

A bankruptcy court may assert jurisdiction over a non-core proceeding when that proceeding is "related to" a case under Title 11. 28 U.S.C. § 157(a). The test for determining whether a proceeding is related to a case under Title 11 is "whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy."

Pacor, Inc. v. Higgins, 743 F. 2d 984, 994 (3d Cir. 1984). Plaintiff filed bankruptcy under chapter 7 and is alleging that he has been damaged by Defendant's postpetition torts. Any recovery that Plaintiff may obtain against Defendant would have no conceivable effect on the estate being administered in bankruptcy because the proceeds of such a recovery would not flow into Plaintiff's bankruptcy estate, thus, Plaintiff's claims are not "related to" a case under Title 11.² The court thus lacks subject matter jurisdiction over Plaintiff's claims for slander and intentional infliction of emotional distress.

CONCLUSION

Plaintiff's allegations regarding Defendant's violation of the automatic stay fail to state a claim for which relief can be granted because they do not demonstrate that Defendant engaged in conduct that violates the automatic stay. Plaintiff's claims for slander and intentional infliction of emotional distress do not arise under the Bankruptcy Code nor are they otherwise related to a case under Title 11. Accordingly, it is hereby

ORDERED, that Defendant's motion to dismiss the complaint is granted.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the United States Trustee.

IT IS SO ORDERED, this the ____ day of February, 2005.

² Even if Plaintiff's claims were related to his bankruptcy proceeding, jurisdiction in the bankruptcy court would be improper because 28 U.S.C. § 157(b)(5) mandates that "personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose."

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE